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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 997

ASSOCIATED TRUCK LINES, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Michigan, Southern Division

JURISDICTIONAL STATEMENT

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Appellees.

On Appeal from the United States District Court for the Western District of Michigan, Southern Division

---

JURISDICTIONAL STATEMENT

Appellants, Associated Truck Lines, Inc., American Trucking Associations, Inc., and the Regular Common Carrier Conference of American Trucking Associations, Inc., appeal from the judgment of the United States District Court for the Western District of Michigan, Southern Division, entered on September 29, 1969, affirming a report and order of the Interstate Commerce Commission decided December 31, 1968, requiring the establishment by appellant Associated Truck Lines, Inc., of through-route, joint-rate, and interchange arrangements on shipments of furniture moving beyond Associated's lines, and directing the suspension of future similar tariff filings of other motor common carriers of

property cancelling such through-route, joint-rate, and interchange arrangements. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that the questions are substantial.

OPINION BELOW

The opinion and judgment of the District Court for the Western District of Michigan, Southern Division, entered September 29, 1969, but not yet officially reported at the time of the printing of this statement,[1] is reproduced in Appendix A hereto. A copy of the report and order of the Interstate Commerce Commission in Docket No. 34815, *National Furniture Traffic Conf.* v. *Associated Truck Lines, Inc.*, 332 I.C.C. 802, is attached hereto as Appendix B; a copy of the order of January 17, 1968, denying petitions for reconsideration therein is reproduced in Appendix C; a copy of the decision and order of October 10, 1967, therein is reproduced in Appendix D; and a copy of the Examiner's report and recommended order therein is attached as Appendix E.

JURISDICTION

This suit was brought pursuant to 28 U.S.C. § 1336 to enjoin and set aside the report and order of the Interstate Commerce Commission. The decision and judgment of the District Court was entered on September 29, 1969, and notice of appeal was filed October 28, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *American Trucking Associations, Inc.* v. *Atchison, T. &*

[1] The decision is unofficially reported at 1969 Fed. Carr. Rep. ¶ 82,141.

S. F. Ry., 387 U.S. 399 (1967); *United States* v. *Drum*, 368 U.S. 370 (1962); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The provisions of subsections (b), (c), and (d) of section 216 of the Interstate Commerce Act, 49 U.S.C. § 316, are reproduced in Appendix F hereto.

QUESTIONS PRESENTED

1. Whether the Commission's requirement that Associated Truck Lines, Inc., in its tariff, shall establish with other carriers through-route, joint-rate, and interchange arrangements on shipments of furniture moving beyond its own lines, contravenes the provision of 49 U.S.C. § 316(c) which permits, but does not require, common carriers of property by motor vehicle to establish such through-route, joint-rate, and interchange arrangements.

2. Whether the Commission's determination to suspend arbitrarily from carrier tariffs the future cancellation by other property motor common carriers, through-route, joint-rate, and interchange arrangements with other carriers on shipments of particular commodities moving beyond their lines contravenes the provisions of 49 U.S.C. § 316(c) permitting, but not requiring, the establishment of such through-route, joint-rate, and interchange arrangements.

STATEMENT OF THE CASE

Effective May 1, 1966, appellant Associated Truck Lines, Inc. (Associated), cancelled its through-route, joint-rate, and interchange arrangements on shipments of furniture between Central States territory[2] and the

[2] Central States territory generally embraces the States of Illinois, Indiana, Iowa, Michigan, Missouri, Ohio, Pennsylvania, West Virginia, and Wisconsin.

South.[3] Nine months later, on February 5, 1967, appellee National Furniture Traffic Conference (Conference) filed a complaint with the Interstate Commerce Commission (Commission) alleging that the tariff cancellation violated various provisions of the Interstate Commerce Act, and the matter was assigned for handling by modified procedure.

On July 27, 1967, the Commission served the report and recommended order of its Examiner (Appendix E) finding that the assailed tariff provision had not been shown unlawful and recommending that the complaint be dismissed. On exceptions and reply thereto, by decision and order dated October 10, 1967 (Appendix D), the Commission, Review Board No. 4, affirmed and adopted, with modification, the Examiner's report and recommended order, and, by order dated January 17, 1968 (Appendix C), the Commission, Division 2 acting as an Appellate Division, denied the Conference's petition for reconsideration. However, by order dated February 19, 1968, upon petition by the Conference, the proceeding was declared to be one involving an issue of general transportation importance, thus permitting reconsideration by the entire Commission.

On reconsideration, with one member concurring in part and one member dissenting, the Commission issued the assailed report and order (Appendix B) finding that Associated's tariff provision in question is an unreasonable practice contrary to section 216(b) of the Act, 49 U.S.C. § 316(b), and that it unduly and unreasonably disadvantages shipments of furniture contrary to section 216(d), 49 U.S.C. § 316(d), and is, therefore, unlawful. (App. B, pp. 22a-23a) Although Appellant Associated was the only defendant before it and although the complaint brought into issue only the assailed tariff provi-

[3] The South territory generally embraces the States of Alabama, Arkansas (in part), Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

sion of Associated, the Commission acted to condemn and cancel all similar tariff filings, both existing and to be proposed for the future, of all motor common carriers of property subject to its jurisdiction. It directed its Board of Suspension to suspend, "upon its own motion, even without shipper protest, future selective tariff filings similar to the one at hand," and announced that, as to those tariff provisions already established and not subject of an Investigation and or Suspension proceeding or formal complaint, it "would endeavor to obtain the necessary reforms" through the efforts of its Section of Tariffs and field staff. (App. B, p. 22a) By order dated March 6, 1969, appellants' petitions for reconsideration were denied.

Action was brought in the United States District Court for the Western District of Michigan, Southern Division, under Title 28, United States Code, sections 1336 and 2321, to review the ruling of the Commission. In a decision entered September 29, 1969 (App. A), the District Court affirmed the Commission's report and order. After summarizing the factual background of the assailed Associated tariff publication, the Commission's findings and those of the concurring Commissioner with respect thereto, the Court stated (App. A, p. 5a):

> "From an examination of the record we find substantial evidence, considering the record as a whole, to support this finding of the Commission.
>
> "The determination of the Commission is hereby affirmed."

The District Court did not consider and pass upon the question of the Commission's power to require Associated to establish through-route, joint-rate, and interchange arrangements in the light of the provisions of 49 U.S.C. § 316(c) making the establishment of such arrangements permissive rather than mandatory, nor upon the question of the lawfulness of the Commission's arbitrary condemnation of other similar tariff provisions not put

in issue before it, even though these questions were properly raised in the complaint and preserved in brief and oral argument.

THE QUESTIONS ARE SUBSTANTIAL

The assailed report and order of the Commission abruptly reversed a long line of decisions [4] which have consistently held that Section 216(c) of the Interstate Commerce Act [5] is permissive and that, by its terms, motor common carriers of property are free to establish and maintain, and also free to withdraw or cancel, through-route, joint-rate, and interchange arrangements with other carriers. Although the complaint put into issue a single tariff provision of one individual motor carrier, the Commission used this proceeding to promulgate a new policy [6] radically limiting the right of motor common carriers of property under section 216(c) to voluntarily establish and maintain through-route, joint-rate, and interchange arrangements on shipments of property moving beyond their own lines.[7] In the assailed

[4] Cited in Appendix B, pp. 11a-12a.

[5] 49 U.S.C. § 316(c), reproduced in Appendix F hereto.

[6] The precedential nature of the proceeding was announced by its designation as one "involving an issue of general transportation importance" (App. B, pp. 7a-8a), thus permitting plenary consideration by the entire membership of the Commission under its General Rules of Practice (49 C.F.R. § 1100.101(a)(3)), and by the generalized statement of the question:

> "We reopened this proceeding to consider whether a motor common carrier of general commodities may lawfully refuse to participate in through routes, joint rates, and interchange agreements with respect to some authorized commodities and, at the same time, hold itself out to provide such service with respect to other authorized commodities." (App. B, p. 8a)

[7] The association appellants (American Trucking Associations, Inc., and Regular Common Carrier Conference of ATA) intervened in the proceeding before the Commission and joined in the judicial appeal because of the impact of this decision on all motor common carriers of property.

report and order, the Commission not only declared unlawful the individual tariff publication involved, but also condemned all similar tariff publications of all motor common carriers of property, both those presently in effect and those to be filed in the future.[8]

Section 216(c), unlike the statutory provisions governing other types of carriers,[9] provides that motor common carriers of property "*may* establish reasonable through routes and joint rates," but does not require them to do so. Despite this permissive provision of the governing statute, the Commission in the assailed report and order required Associated to establish through-route, joint-rate arrangements on shipments of furniture moving beyond its line and, in addition, directed that future similar tariff publications seeking to cancel such arrangements only on certain commodities be suspended, without shipper protest and without regard for the reason for the cancellation. The report declares, in the words of the dissenting Commissioner,[10] "in effect and as a matter of law, that if a motor common carrier maintains through routes on some traffic, it must maintain through routes on all traffic."

In affirming the assailed report and order, the District Court did not consider the basic question of the Commission's power under the statute to order a motor common carrier of property to establish and maintain through-route, joint-rate arrangements on all authorized

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[8] As to future tariff filings similar to the one at hand, the Commission directed its Board of Suspension to suspend them, "upon its own motion, even without shipper protest," and as to those publications already established and not subject to proceedings, it stated it would "initially endeavor to obtain the necessary reforms" through the efforts of its Section of Tariffs and field staff. (App. B, p. 22a)

[9] See 49 U.S.C. §§ 1(4) (common carriers subject to part I of the Act, 316(a) (common carriers of passengers by motor vehicle), and 905(b) (common carriers by water).

[10] Appendix B, p. 25a.

commodities if it provides such arrangements on any commodities. The Commission's determination for the first time herein that it has such power under the statute requires plenary consideration by this Court.

In enacting the Motor Carrier Act, 1935,[11] Congress specifically rejected the original proposal for mandatory through routes and joint rates between motor common carriers of property and adopted, in lieu thereof, the current permissive provision.[12] And on a number of occasions at least since 1961, Congress has failed to enact mandatory through-route, joint-rate provisions for motor carriers of property although urged by the Commission to do so.[13] Most recently on April 24, 1969,[14] the Commission submitted a legislative recommendation seeking amendment of part II of the Act to authorize it "to require the establishment of through routes and joint rates between motor common carriers of property and between those carriers and common carriers by rail, express, and water."[15]

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[11] Now part II of the Interstate Commerce Act, 49 U.S.C. §§ 301 *et seq.*

[12] Appendix B, p. 11a, citing 79 Cong. Rec. 5655.

[13] Such legislation was recommended by the Commission in each of its annual reports to Congress in 1961-1964 (75th Annual Report, p. 186; 76th Annual Report, p. 201; 77th Annual Report, p. 19; 78th Annual Report, p. 69), and a number of bills were introduced in Congress to implement these recommendations, but none were enacted. (S. 3510 and H.R. 12362 in the 87th Congress; S. 676 and H.R. 2088 in the 88th Congress; S. 1785 and H.R. 7166 in the 89th Congress; S. 751 and H.R. 6533 in the 90th Congress.) In addition, S. 1062 and H.R. 4701 (88th Congress), omnibus transportation bills, included proposals to encourage through routes and joint rates for all modes of transportation, but were not enacted.

[14] Interstate Commerce Commission press release # 112-69.

[15] Under Section 216(c), such through routes and joint rates between motor common carriers of property, on the one hand, and, on the other, common carriers by rail, express, and water, are also permissive. The assailed report and order also raises the question whether the Commission may require rail, express and water com-

These Commission efforts to secure legislative change are not prompted by any question as to the scope of its authority. The Commission has consistently recognized that under the permissive provisions of Section 216(c) it has no power to compel the establishment of through routes by motor common carriers of property and it cannot, therefore, prevent such carriers from closing such through routes, whether the route was closed only as to certain points,[16] only in conjunction with certain connecting carriers,[17] or only on movements on which the publishing carrier would be the intermediate rather than the originating or delivering carrier.[18] In testimony in support of legislative proposals for mandatory through routes and joint rates for motor common carriers of property, the Commission has denied that it has the very power it seeks here to assert. In the justification in support of S. 751 in the 90th Congress, then Chairman Tucker of the Commission stated: [19]

> "At present the Commission does not have the authority to require motor carriers to establish the through routes and joint rates. As a result, motor carriers may restrict the establishment of through routes and joint rates to selected commodities."

And in testimony on the proposed legislation in May 1967, just nineteen months before the assailed report and

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mon carriers which have entered into through-route, joint rate arrangements with motor carriers on specific commodities to refrain from cancelling them if they so desire, or, indeed, to enter into such arrangements with motor carriers on *all* commodities.

[16] *Southeast Shippers Assn., Inc.* v. *Akers Motor Lines, Inc.*, 54 M.C.C. 770 (1952) (cancellation of through route, joint rate, and interchange arrangements on shipments to or from Malone, N.Y.)

[17] *East South Joint Rates and Routes, Cancellation*, 44 M.C.C. 747 (1945) (cancellation because of inability to agree upon interchange arrangements.)

[18] *East South Joint Rates and Routes, Cancellation, supra.*

[19] 113 Cong. Rec. 1983.

order were issued,[20] Commissioner Murphy read from a letter complaining of carrier cancellation of through-route, joint-rate, and interchange arrangements on furniture, and stated: "However, the Commission has no effective manner of correcting the described situation." [21]

In the assailed report and order, the Commission disclaimed any attempt to compel through routes and joint rates: [22]

> "We desire to make it unmistakably clear that we are not attempting here to assert any jurisdiction to establish through routes, joint rates, and interchange arrangements between common carriers of property by motor which Congress has entrusted to the managerial discretion of these carriers."

Nevertheless, the order, if it becomes effective,[23] will require Associated to establish through-route, joint-rate arrangements on shipments of furniture. Additionally, the report and order seeks to apply the same compulsion to all

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[20] Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 90th Cong., 1st Sess., ser. 90-37, at 21-22 (1967).

[21] *And see* I.&S. Docket No. M-20023, *Furniture Restrictions By Associated Transport, Inc.* (not printed) (decided February 24, 1966), cited in the assailed report and order (Appendix B, p. 10a, n.2), in which the Commission, Rates and Practices Review Board, referring to *East South Joint Rates and Routes, supra*, said:

> "If a motor common carrier of property may cancel its participation in through routes and joint rates applying on all commodities, it logically follows that it may do so with respect to one commodity provided that some unlawfulness, under some other section of the act, does not result therefrom." (mimeo. p. 6).

[22] Appendix B, pp. 21a-22a.

[23] By stipulation and order agreed to by the parties and approved by the District Court below, appellee-defendants United States of America and Interstate Commerce Commission agreed to the entry of an interlocutory injunction to remain in effect until final determination by the three-judge Court in consideration of a rapid disposition of this matter on the merits. The Commission order herein has not yet become effective.

other motor common carriers of property by directing automatic suspension of other similar tariff provisions tendered for filing. Thus, a motor common carrier of property seeking, for whatever reason, to cancel through-route, joint-rate arrangements on particular traffic will be denied its statutory right to do so. In either case, the carrier will be denied the freedom, which the Commission has heretofore consistently recognized, to establish and maintain through-route, joint rate arrangements.

The Commission's decision rests upon the proposition that for a motor common carrier to hold out through-route, joint-rate arrangements on some authorized commodities and not on others is *per se* unlawful: "Associated may not merely refuse to participate in joint movements of furniture, and, at the same time participate in such movements on other traffic."[24] As the dissenting Commissioner states,[25] this decision establishes a stricter rule under this permissive statutory provision than that applied under provisions which authorize the Commission to require through routes between carriers of other modes. In numerous proceedings involving carriers by railroad under the mandatory provisions of part I of the Act, both the Commission and the courts have approved through-route, joint-rate arrangements only on specific commodities,[26] even over a challenge because the arrangements were not established for all commodities.[27]

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[24] Appendix B., p. 21a.

[25] Appendix B., pp. 25a-26a.

[26] *E.g., Denver & R.G.W.R. Co.* v. *Union P.R. Co.*, 351 U.S. 321 (1956); *Western Pacific R. Co.* v. *Camas Prairie R. Co.*, 316 I.C.C. 795 (1962), aff'd *sub nom. Western Pacific R. Co.* v. *United States*, 230 F. Supp. 852 (N.D.Cal. 1964); *Chicago, M., St. P.&P.R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453 (1957), aff'd *sub nom., Chicago, M St. P. & P.R. Co.* v. *United States*, 182 F. Supp. 81, 366 U.S. 745 (1961).

[27] See *Denver & R.G.W.R. Co.* v. *Union P.R. Co., supra*, 351 U.S. at 326.

Although disclaiming any assertion of jurisdiction to compel through-route, joint-rate arrangements between motor common carriers of property contrary to the statute, the Commission has established a new policy declaring, in effect, that if such a carrier maintains through routes on some traffic, it must maintain them on all traffic. The choice left to the carrier under this policy is clearly either to forego all through-route, joint-rate arrangements on traffic moving beyond its own lines or to establish and maintain such arrangements on all such beyond traffic. The decision substantially nullifies that freedom to establish such through-route, joint-rate arrangements "which Congress entrusted to the managerial discretion of these carriers." [28] The failure of the District Court to consider and decide the question of whether the Commission's action herein exceeds its statutory authority requires plenary consideration by this Court.

[28] Appendix B, pp. 21a-22a.

CONCLUSION

The questions presented by this appeal are new, substantial and of public importance. For the reasons stated, appellants urge the Court to note probable jurisdiction and to reverse the judgment of the District Court with remand to that Court for disposition consistent with this Court's opinion.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 6070

ASSOCIATED TRUCK LINES, INC., AMERICAN TRUCKING ASSOCIATIONS, INC., and REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

and

NATIONAL FURNITURE TRAFFIC CONFERENCE INC.,

Intervening Defendant.

Before: MCCREE, Circuit Judge; KENT, Chief District Judge, and FOX, District Judge.

Over a period of many years, Associated Truck Lines, Inc., plaintiff in this case, has had agreements with other carriers for through routes and joint rates for the carrying of general commodities, including furniture, between the Central States area and the Southern States area.[1]

[1] Pursuant to 49 USCA § 316(c).

In 1965, Associated published tariff restrictions and a cancellation of the line rate schedule on shipments of furniture. Shippers would then have been charged the higher combination of local rates on through routes. The Commission, after consideration, found the higher combination rates were not just or reasonable. No appeal was taken to the courts from the Commission's finding.[2]

Thereafter in 1966, Associated cancelled all through routes and joint tariff arrangements on shipments of furniture between the Central States territory and the Southern States territory.

Intervening defendant, National Furniture Traffic Conference, filed a complaint with the Interstate Commerce Commission challenging the validity of this cancellation. The Hearing Examiner found that the cancellation was not unlawful and recommended that the complaint be dismissed. This recommendation was followed by the Commission, Review Board No. 4, and the Commission, Division 2, acting as an appellate division. A petition for reconsideration by the Commission was denied, however, and a second petition for reconsideration (based on the ground that the issue involved was one of general transportation importance) was granted. The full Commission reversed the Examiner and the Review Board. It found the cancellation was unlawful and thereby restored the through route-joint rate arrangement for shipments of furniture.[3]

The complainant before the Interstate Commerce Commission (National Furniture Traffic Conference, Inc.) maintained before the Commission and before this court that once a motor common carrier of general commodi-

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[2] Docket No. M-19650, Furniture Restrictions Between Central and Southern States (not printed), decided September 20, 1965.

[3] Docket No. 34815, National Furniture Traffic Conference v. Associated Truck Lines, Inc. December 31, 1968.

ties elects to establish through routes, that carrier is obligated under its certificate of public convenience and necessity to transport all commodities over those routes until the through routes are closed to all commodities.

The plaintiff, Associated, maintains that having *voluntarily* entered into the agreements for through routes and joint rates, it can cancel such agreements under the provisions of Section 216(c), 49 USCA § 316(c), as to some commodities, and still maintain through routes and joint rates as to other commodities in the same territory.

Although we were urged by the National Furniture Traffic Conference to find that a carrier might not withdraw joint through rates for general commodities once it has voluntarily established joint through rates for general commodities, we find it unnecessary to decide that issue because the Commission found that Associated's selective cancellation here clearly placed furniture shippers in a disadvantaged position relative to other general commodities, and found such disadvantage to be undue and unreasonable, and hence unlawful under Section 216(b), (c) and (d). American Trucking Association v. A.T. & S.F. R. Co., 18 L.Ed.2d 847, 863 (1967); Greyhound Lines, Inc. v. U.S., 268 F.Supp 746 (ND. Ill. E.D. 1967); Crescent Liquor Co. v. Platt, 148 Fed. 894, 900-902 (N.D. W.Va. 1906).

The Commission found that this selective cancellation of the through routes and joint rates would not only require a furniture shipper "to pay a combination of two local rates (rather than a lower single-factor rate), but would also . . . put [the shipper] to the expense (and subject to the attendant delay) of arranging to have a warehouseman or other person at the point of interchange act as his agent in accepting the shipment from Associated and forwarding it on a new bill of lading." 332 ICC 808, 809.

Furthermore, the Commission found that routing shipments and processing damage claims would be further complicated. 332 ICC 812.

The total effect of this action, in many situations, will be to restrict the movement of furniture to those territories where single line service is available. The segmented and regionalized transportation system which will develop from this tariff rule thus permits Associated selectively to encourage only that traffic which Associated believes more desirable and lucrative.

The Commission then found that such a selective tariff will prejudice furniture shippers relative to other general commodity shippers and was contrary to Associated's duty to observe reasonable practices and its duty not to put any shipper at an undue and unreasonable disadvantage.

In a concurring opinion, Commissioner Tuggle found that Associated's action was unduly discriminatory because it gave an unreasonable economic advantage to furniture shippers who required only Associated's single-line service to reach a market. Those shippers still receive this service, while those shippers who had used Associated's interline service to market their goods were faced with higher costs and added shipping complications. The result of this practice would be to force the latter shippers out of the market, thus benefitting their single-line competitors. Furthermore, this tariff rule would prejudice shippers between Southern and Central territories, who no longer have Associated's interline service available, "whenever they compete at points with shippers from other territories who need [Associated's] interline service and have it available." 332 ICC 815, 816. Thus, this tariff rule's failure to provide equal treatment to competing traffic required the finding that this tariff was unlawful.

From an examination of the record we find substantial evidence, considering the record as a whole, to support this finding of the Commission.

The determination of the Commission is hereby affirmed.

Certified as a True Copy:

Howard T. Ziel, Clerk,/

By /s/ G. E. Larink
Deputy Clerk

Sep 28 1969

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. 34815

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.

v.

ASSOCIATED TRUCK LINES, INC.

Decided December 31, 1968

On reconsideration, assailed tariff rule providing that defendant maintains no through routes, joint rates, or interchange arrangements on shipments of furniture found to be unlawful. Unlawfulness required to be removed.

John F. Bohman for complainant.

Elmer J. Maue for defendant.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

MURPHY, *Commissioner:*

The defendant, Associated Truck Lines, Inc. (Associated), is a motor common carrier of general commodi-

ties conducting operations in interstate and foreign commerce pursuant to certificate No. MC-69833 and subs thereto. Through its publishing agent, the Central & Southern Motor Freight Tariff Association, Inc., it has caused to be published the following restrictive tariff provision applicable on movements of furniture between central States territory and the South:

> Associated Truck Lines, Inc., maintains no through routes, joint rates, or interchange arrangements on shipments of furniture as described in items 79000 through 83650 in NMFC.[1]

Complainant, the National Furniture Traffic Conference (Conference), is a voluntary association of manufacturers, wholesalers, and retailers of furniture. By complaint filed February 5, 1967, it alleges that the quoted tariff provision violates sections 212(a) and 216 (b), (c), and (d) of the Interstate Commerce Act and it requests this Commission to order the cancellation of this provision so as to restore through routes and joint rates on shipments of furniture between the affected territories.

The modified procedure was followed, and by decision and order, dated October 10, 1967, Review Board No. 4 affirmed and adopted with modification the examiner's report and recommended order which found that the assailed tariff provision had not been shown to be unlawful, and dismissed the complaint. Division 2, Acting as an Appellate Division, by order dated January 17, 1968, denied the Conference's petition for reconsideration. Subsequently, by order dated February 19, 1968, this proceeding was designated by us as one involving an issue

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[1] This tariff provision became effective July 2, 1966, and was contained in paragraph (b) of item 545-K in Central & Southern class tariff supplement 95 to tariff 100-D, MF-ICC 287. This is a reissue of an item which first became effective May 1, 1966. There has since been another reissuance as more fully explained in the appendix hereto.

of general transportation importance. Pursuant thereto, a petition for reconsideration was filed by the Conference. Associated replied, and by order dated June 11, 1968, the proceeding was reopened for reconsideration on the present record.

We reopened this proceeding to consider whether a motor common carrier of general commodities may lawfully refuse to participate in through routes, joint rates, and interchange agreements with respect to some authorized commodities and, at the same time, hold itself out to provide such service with respect to other authorized commodities.

BACKGROUND

The assailed tariff rule was published on behalf of Associated primarily on the asserted grounds that the transportation of furniture over its authorized routes, pursuant to through routes, joint rates, and interchange agreements with other common carriers, could not be rendered at a compensatory level, because of the transportation characteristics of furniture. Prior to the publication of the tariff item now under consideration, Associated caused to be published schedules providing for the nonapplication of joint-class rates on shipments of furniture between points in central and southern territories. This latter publication was considered in Investigation and Suspension Docket No. M-19650, *Furniture Restrictions Between Central and Southern States* (not printed), decided September 20, 1965, wherein it was found that the higher combination rates resulting from this proposed cancellation of joint-class rates were not shown to be just and reasonable. The schedules were ordered canceled. Subsequently, Associated caused to be published the present tariff rule canceling its participation in all through routes, joint rates, or interchange agreements on shipments of furniture.

Associated maintains that furniture, generally, has "three undesirable traits from a transportation point of view." It avers that furniture is light and bulky, easily susceptible to damage, and is difficult to stow and transport in the same vehicle with other general commodities. It states that a "spot check" indicates that approximately 75 percent of its furniture shipments weigh less than 5 pounds per cubic foot and approximately 35 percent weight less than 3 pounds per cubic foot. It further states that the average shipment of furniture weighs less than 200 pounds. Damage claims on furniture are high, and it requires special care. For the above reasons Associated claims that the revenue it receives from transporting furniture in joint-line service is insufficient to warrant its participation in such movements.

Shippers of furniture are, to a large extent, dependent upon motor carrier service. There are nearly 4,000 separate categories of furniture listed in the National Motor Freight Classification A-9 with less-than-truckload ratings ranging from class 55 to class 400. Many furniture manufacturers produce a number of furniture items with a great number of individual variations made according to special order. Frequently wholesale and retail department stores maintain low inventories, do not purchase furniture in truckloads, and may be situated at points apart from major distribution centers. Because of the discontinuance of railroad less-than-carload service and the increasing number of restrictions placed upon the services afforded by freight forwarders, furniture shippers have been relegated essentially to the exclusive use of motor common carriers for transportation to distant markets. However, few, if any, motor common carriers have the requisite authority or ability to provide a truly nationwide service, and the furniture industry frequently depends upon the establishment by motor common carriers of through routes, joint rates, and interchange agreements for the most efficient and economical means of distributing a large part of its goods.

The action taken by Associated is not unique. Because of the greater revenue derived from transportation of other traffic and the alleged undesirable transportation characteristics of furniture, many other carriers have taken action similar to that of Associated.[2] This Commission has expressed serious concern with this practice not only as it affects the movement of furniture [3] but also the general movement of small shipments.[4]

Legislative history and prior proceedings.—Prior to the enactment of part II of the Interstate Commerce Act in August 1935, the motor carrier industry was not subject to Federal regulation, and motor carriers were generally free to establish among themselves any arrangements that suited their individual interests. The Motor

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[2] See, for example, I. and S. Docket No. M-20023, *Furniture Restrictions by Associated Transport* (not printed), decided February 24, 1966; I. and S. Docket No. M-20285, *Furniture Restrictions, Pulaski Highway Express, Inc.* (not printed), decided July 18, 1966; and Docket No. 34804, *Joint Routes, Central and Southern States* (not printed), decided March 9, 1967. Also see the appendix hereto.

[3] See the Notice of Proposed Rulemaking and Order, Ex Parte No. MC-72, Motor Service on Shipments of New Furniture, dated July 11, 1968.

[4] See "Small Shipments Problem, Report of the Ad Hoc Committee of the Interstate Commerce Commission," November 30, 1967. In this regard, in the early part of 1967, the Commission began a program whereby the Bureau of Enforcement is empowered to intervene in "Investigation and Suspension" cases. Under this program a significant number of restrictive tariff provisions have been suspended by the Commission's Board of Suspension acting on its own motion, and in all such cases the respondents either voluntarily canceled the restrictive provisions in question or tacitly agreed to cancellation by not filing supporting statements. Still, the Commission, while suspending proposed cancellations of joint-rate arrangements, has not suspended, on its own motion, proposals for the complete closing of through routes. However, since the action of division 2, on February 15, 1968, in I. and S. Docket No. M-22071, suspending, upon protest, a proposed cancellation of joint rates, through routes, and interchange arrangements, about 32 similar restrictive proposals have been suspended upon the protest of interested persons.

Carrier Act of 1935, however, subjected for-hire motor carriers to economic regulation by this Commission and provided, as here pertinent, that common carriers of property by motor vehicle may establish reasonable through routes and joint rates with other such carriers. Specifically, section 216(c) of the act provides:

> Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers * * *. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Section 216(c) was inserted in the Motor Carrier Act of 1935 at the behest of the small motor vehicle operators. The original proposal[5] for mandatory through routes and joint rates between motor common carriers of property was disapproved because "many of the small operators were afraid that if this were done it would give preference to the railroads, and therefore they were afraid to ask it." 79 Cong. Rec. 5655. The Commission has consistently taken the position that section 216(c) is permissive. The section authorizes, but does not require, the establishment of through routes and joint rates.[6] See: *Hausman Steel Co.* v. *Seaboard Freight Lines, Inc.*, 32

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[5] Section 216(a), as originally drafted, applied to all common carriers by motor vehicle and required the establishment of reasonable through routes. Subsequently, by amendment, this section was limited to passenger carriers only.

[6] The Commission has frequently proposed legislation to amend section 216(c) and (e) and thereby authorize the Commission, after investigation and hearing, to require the establishment of through routes and joint rates between motor common carriers of property, and between such carriers and common carriers by rail, express, and water.

M.C.C. 31; *Rayons Between Trunk Line and New England Territories*, 44 M.C.C. 280; *East South Joint Rates and Routes, Cancellation*, 44 M.C.C. 747; *Gulf, M. & N. R. Co. Common Carrier Application*, 18 M.C.C. 721; *Lubbock-El Paso Motor Frt. Inc., Com. Car. Application*, 27 M.C.C. 585; *Daniels* v. *Rose*, 43 M.C.C. 726; *Rocky Mt. Lines, Inc.—Elimination of Participation*, 31 M.C.C. 320; *Restrictions, Riss & Co., And Eliminations, Hi-Way Motor*, 46 M.C.C. 290; *Strickroot* v. *Detroit & C. Nav. Co.*, 253 I.C.C. 535; *Southeast Shippers Assn., Inc.*, v. *Akers Motor Lines, Inc.*, 54 M.C.C. 770; *Southeast Shippers Assn., Inc.*, v. *Atlanta, C., A. Motor Lines*, 63 M.C.C. 491; *Transport Storage & Distr. Co Ext.—Motor Vehicles*, 86 M.C.C. 549; *Closing of Express Stations in the Southwest and West*, 288 I.C.C. 185; *Freight, All Kinds, Chicago and Ind., Mich., Ohio*, 322 I.C.C. 423; and *Substituted Service—Piggyback*, 322 I.C.C. 301.

The examiner's and board's conclusions and findings.—Based upon the above interpretation of section 216(c), the examiner found that the assailed tariff restriction had not been shown to be unlawful and recommended that the complaint be dismissed. The examiner found complainant's contention, that the subject tariff restriction violated Associated's common carrier obligation, to be without merit.

The examiner further concluded that there was insufficient evidence to demonstrate conclusively that the challenged tariff rule is unjustly discriminatory, unduly prejudicial, or disadvantages furniture contrary to the provision of section 216(d). Citing the *Strickroot* and *East South Joint Rates* cases, *supra*, the examiner stated that "this Commission has no authority to require motor carriers to establish or to maintain through routes or joint rates unless it is shown that the cancellation of some of them and not others would create unjust discrimination, undue preference or prejudice, undue advantage or disadvantage, or otherwise be unlawful under the provisions of the act."

Subsequently, the board, by decision and order, affirmed and adopted the examiner's statement of facts, conclusions, and findings but with the following modification:

> Since the statutory provision regarding through routes and joint rates is permissive only, and not mandatory, the cancellation of such routes and rates would only be an unreasonable practice under section 216(b) if it was shown to be so by appropriate evidence. As stated, the defendant's reason for such cancellation on furniture was that its division of joint-line revenue did not cover its cost, considering the high incidence of damage on the particular traffic. The complainant's evidence here does not show the facts to be otherwise.

The instant proceeding is now before us on reconsideration.

CONTENTIONS OF THE PARTIES

On reconsideration, the Conference argues that the essential issue in this proceeding remains unresolved. Complainant maintains that once a motor common carrier of general commodities elects to establish through routes, that carrier is obligated under its certificate of public convenience and necessity to transport all commodities over those routes until the through routes are closed to all commodities. In support of its position, it emphasizes that on a direct haul, motor common carriers of general commodities are obligated to transport all commodities equally, without discrimination or partiality, over the routes and from and to the points enumerated in its certificate. The Conference reasons that this same duty must likewise prevail on joint hauls, unless there is some specific provision under the act which permits such a carrier to lessen or limit its obligation to haul general commodities. It alleges that section 216(c) has been misconstrued and that the assailed tariff restriction cannot qualify as a valid cancellation of "through routes," inasmuch as traffic other than furniture continues to move over these routes.

Associated notes that the assailed tariff rule is limited solely to the joint-through movement of furniture in only one rate territory and does not affect local single-line traffic or joint-line traffic in other rate territories. Asserting that it still holds itself out to transport furniture from and to the points it is authorized to serve and that, under either the terms of its certificate or the provisions of the act, it is not required to interchange or participate in through routes with other carriers, Associated contends that there is no evidence of its alleged failure to comply with its common carrier duties. Citing *Hausman, East South Joint Rates*, and *Southeast Shippers Association, supra*, Associated argues that this Commission lacks the power to prevent the closing of through routes, except where such action is discriminatory, and submits that the examiner's and the board's findings are correct.

Discussion and Conclusions

The primary reason advanced for the publication of the challenged tariff rule is that, considering the asserted high incidence of damage and other undesirable transportation characteristics of furniture, Associated has been unable to recover its costs from the present division of joint-line revenues on movements of these commodities. It had earlier sought to cancel only the joint-class rates applicable on the movement of furniture but failed to justify the resulting higher combination of local rates applicable over the still open through routes; similarly, its contention, that the proposal was justified by an unusual history of damage claims on furniture, was also rejected. See *Furniture Restrictions Between Central and Southern States, supra.*

By the instant publication, effectively canceling through routes as well as joint rates and interchange arrangements on the movemenut of all furniture, Associated has not only foreclosed the applicability of joint-class rates but also rendered unavailable its local rates on this com-

modity as factors of through combination rates over routes with other carriers. Thus, to effect movement of its products from a point served by Associated to a point served by another carrier, a furniture manufacturer would not only be required to pay a combination of two local rates (rather than a lower single-factor rate), but would also be put to the expense (and subjected to the attendant delay) of arranging to have a warehouseman or other person at the point of interchange act as his agent in accepting the shipment from Associated and forwarding it on a new bill of lading.

This selective action, in many situations, has the effect of restricting the movement of furniture to those territories where single-line service is available. The affected manufacturers of furniture thus are, to a greater extent, relegated to regional or territorial markets for the sale of their products and precluded from freely competing in other markets. Thus, the challenged tariff rule tends to precipitate a disjointed, segmented, and regionalized transportation system and permits Associated selectively to encourage the transportation of traffic which Associated believes to be more desirable and lucrative.

Statutory provisions.—This Commission's jurisdiction and power to regulate common carriers of property by motor vehicle and to establish reasonable requirements for the provision of continuous and adequate service by such carriers are found in several sections of the act. These sections must be administered and enforced with a view to carrying out the national transportation policy, wherein it is declared to be the policy of congress:

> To provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate economical; and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the es-

tablishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; * * *—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

Regulatory jurisdiction is vested in this Commission over the transportation of property by motor carriers engaged in interstate or foreign commerce and equally over the procurement and provision of facilities for such transportation under section 202(a) of the act. In the exercise of this jurisdiction, section 204(a)(1) of the act, delineates the duty of this Commission "to regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service * * *." Also, section 204(a)(6) requires us "to administer, execute, and enforce all provisions of this part [part II] and to make all necessary orders in connection therewith." Further, section 208(a) provides that "such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6)," may be attached to the exercise of the privileges granted by the certificate issued under sections 206 and 207 of the act. This Commission, under the provision of section 212(a), may, after notice and hearing, suspend, change, or revoke a certificate in whole or in part for willful failure to comply with any provisions of this part or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate.

Section 217(a) of the act requires every common carrier by motor vehicle to file with this Commission tariffs showing all the rates and all services in connection

therewith for transportation of property in interstate commerce between points on its own route and between points on its own route and points on the route of any other such carrier, when a through route and a joint rate shall have been established. No change may be made in any rate or any rule, regulation, or practice affecting such rate or the value of service thereunder, specified in any effective tariff of a common carrier, except after proper notice and compliance with section 217(a). See section 217(c). In addition, this Commission has ample authority to require motor common carriers to observe reasonable practices in connection with their rates and services and to consider complaints alleging unreasonable practices in the publication of rates or the conduct of operations. See sections 204(c) and 216(b) of the act.

These provisions of the act are indicative of the comprehensive jurisdiction and broad powers of this Commission to regulate the transportation of property by motor common carriers engaged in interstate or foreign commerce; to establish reasonable requirements with respect to continuous and adequate service; to administer, execute, and enforce all provisions of part II; to make all necessary orders in connection therewith; to attach such terms and conditions to the exercise of the privilege granted by a certificate as are necessary to insure continuous and adequate service by the holders thereof; to compel compliance with the provisions of part II by certificated motor carriers; and to require motor common carriers to observe reasonable practices relating to the provision of adequate service. All of these provisions must be administered and enforced with a view to carrying out the national transportation policy and accordingly are designed to provide a completely integrated regulatory system over motor common carriers of property. This Commission has powers commensurate with the goal and limitations on such powers will not be inferred from nonspecific statutory language.

Considering the assailed restrictive tariff rule in this context, we think it follows that if such a rule is found to constitute an unreasonable practice contrary to the act and adverse to the public interest, this Commission has the requisite authority to order its cancellation.

Duties of Common Carriers.—Section 203(a)(14) defines the term "common carrier by motor vehicle" as any person which holds itself out to engage in the transportation by motor vehicle in interstate commerce of property or any class or classes thereof for compensation. The chief characteristic of motor common carriage is the holding out of service to the public. Section 216(b) specifically prescribes the duty of every common carrier of property by motor vehicle:

> [T]o provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

Each certificate of public convenience and necessity granted to a common carrier by motor vehicle is conditioned upon the holder's rendering reasonably continuous and adequate service to the public pursuant to the authority therein granted. These sections of the act embody the common law obligations of common carriers to carry all goods offered for transportation and to serve all shippers. They are obligated to accept and transport all freight offered to them in accordance with the provisions of their certificates, and this duty is, with limited exceptions, an absolute one. If the public is to be adequately protected, common carriers must be held strictly accountable for their performance. Motor common carriers are

engaged in what has always been regarded as the public's business, and must, to the best of their abilities, serve all who seek their service, and serve them equally and fairly.[7]

Associated holds authority from this Commission to transport general commodities. Such a broad grant of authority carries with it a broad responsibility to the public. Associated has a duty, both at common law and under the act, to provide adequate service to all shippers of general commodities, including furniture. This duty is equal with respect to all general commodities. One class of commodities or group of shippers may not be favored. The same quality of service must be available with respect to all general commodities.

The tariff rule under consideration here ends all through routes and joint rates on furniture, while at the same time, such arrangements remain in effect with respect to other commodities. Consequently, not only will furniture shippers be required to pay higher local rates over the routes of Associated, but also over those of any connecting common carrier participating in such a movement. In addition, furniture shippers will be precluded from using a through bill of lading and, therefore, must execute separate bills for each segment of the movement. Damage claims and routing will, likewise, be further complicated and increased to the point where it may be economically impossible for the affected furniture manufacturer to distribute its commodities in other than local markets accessible through single-line service. Moreover, misunderstandings between shipper and its customers on furniture tendered to or moved by Associated under its restrictive provisions can lead to the loss of shipper's business. The net effect of the restrictive tariff rule is to discourage shippers of furniture from utilizing the routes of Associated in the distribution of their goods.

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[7] See *Planters Nut & Chocolate Co.* v. *American Transfer Co.*, 31 M.C.C. 719, 721-722, 729.

The fundamental inequity of all this is emphasized, of course, by Associated's continued participation in through routes, joint rates, and interchange arrangements on other general commodities which it deems more desirable.

Thus, it is clear to us that Associated is holding itself out to provide a greater service with respect to other general commodities than it offers on furniture. Such a selective holding out serves to injure furniture shippers and, in our opinion, is contrary to the duty of Associated to observe reasonable practices under section 216(b) of the act, a duty which is not relieved by section 216(c) and one which we are bound to enforce under section 204(a)(6).

The only authority given to motor common carriers by section 216(c) of the act is to establish *reasonable* through route and joint rates, charges, and classifications with other such carriers. No unfettered license is given to pick and choose the through service which will be provided. There is nothing in the legislative history of section 216(c) which would confer freedom upon a common carrier to establish a scheme of through routes and joint rates which is selective as to a particular class of traffic and none of the leading cases stands for such a proposition.

Associated seeks to justify its action by the assertion that the revenue it receives from participating in through joint-line movements of furniture is insufficient. The short answer to this claim is that other remedies are available under other sections of the act. For example, in I. and S. Docket No. M-22323, *Increased Rates and Charges, Central and Southern Territories* (not printed), Associated, along with other carriers, is seeking general rate increases on all types of traffic. It should also be noted that the motor carriers, including defendant, increased the ratings and rates on many articles of furniture effective January 16, 1968. The increased ratings and rates were not suspended but were placed under investigation in No. 34922, *Classification Ratings on Furni-*

ture (not printed). Associated may not merely refuse to participate in joint movements of furniture, and, at the same time participate in such movements on other traffic. Moreover, even though other motor services, including the separately conducted services of defendant on uncrated shipments of furniture, are available to shippers of furniture, the availability of other services, while important, does not provide a proper defense for the action of Associated. We are here measuring the services of Associated on the movement of furniture in relation to its services on other general commodities. General freight carriers, such as defendant, are the primary specialists in the handling of less-than-truckload traffic. Furniture shippers, which need less-than-truckload services as much as or more than other shippers, should not be deprived of through general merchandise service merely because there are other specialized forms of transportation available for the movement of furniture.

This Commission has previously found that under section 216(c) it has no authority to require the establishment or maintenance of through routes and joint rates. However, as noted, there is nothing in our prior reports which prevents us from ending unreasonable practices of the kind found to exist here.[8]

Furthermore, Associated's selective holding out clearly places furniture in a disadvantaged position relative to other general commodities. We find such disadvantage to be undue and unreasonable, and hence, unlawful under section 216(d).

We desire to make it unmistakably clear that we are not attempting here to assert any jurisdiction to establish through routes, joint rates, and interchange arrangements between common carriers of property by motor which Congress has entrusted to the managerial discre-

[8] Also see, for example, *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156, 166, 170 (1962).

tion of these carriers. However, we are vitally concerned with the actions of common carriers in relation to the reasonable exercise of the permissive provisions of section 216(c) and their obligations to the public under the terms of the act. Accordingly, we find that the selective cancellation of through route arrangements on specified classes of commodities herein will adversely affect the public interest and section 216(c) does not foreclose us from observing our plain duty to preclude this unreasonable practice.

Concurrently with the service upon the parties of our decision herein, the Commision's Board of Suspension should suspend, upon its own motion, even without shipper protest, future selective tariff filings similar to the one at hand. As to those tariff provisions already established and not the subject of an Investigation and/or Suspension proceeding, or a formal complaint of a shipper, we will initially endeavor to obtain the necessary reforms by working through our Section of Tariffs, our field staff, and the carriers either directly or indirectly through Carrier Service Committees and tariff publishing agents. The situation as it now exists with respect to furniture is not tolerable and it is hoped that carriers will quickly and favorably respond to the dictates of our decision herein without the need for further formal action.

Findings

We find that, in the circumstances herein, the assailed tariff rule, effectively closing the through routes and canceling the joint rates and interchange arrangements on shipments of furniture only, published on behalf of

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Our decision herein in no way lessens the overall need as we see it for through route-joint rate legislation. Our decision herein will curb the practice of extreme selectivity, but will fall short of the goal of placing a positive duty upon rail, water, and motor common carriers to provide coordinated through service.

Associated Truck Lines, Inc., is an unreasonable practice and, hence, unlawful.

We further find that the assailed tariff rule, published on behalf of Associated Truck Lines, Inc., unduly and unreasonably disadvantages shipments of furniture and, hence, is unlawful.

COMMISSIONER TUGGLE, concurring in part:

While I agree with the majority's finding that the assailed tariff rule is an unreasonable practice and, hence, unlawful in the circumstances present here, I do not agree with the emphasis placed on the fact that the iniquity of the rule lies in its withholding from one commodity a type of service which the defendant will continue to provide on all other general commodities. In my opinion, the issues posed in this proceeding are more simple than might be supposed from reading the report, and there are less complex reasons for striking down the assailed tariff rule than those given in the report.

Simply stated, the defendant has canceled its participation in all through routes, joint rates, or interchange arrangements on furniture moving between Central States territory and the South (1) while continuing to handle any furniture movements beteween those territories when it can perform the service without interlining, and (2) without canceling such participation on other interterritorial movements. In these circumstances, it seems to me, the rule may result in undue preference and prejudice in certain situations and therefore must be found to be unlawful. Two specific situations come to mind. First, insofar as there are any shippers in central and southern territory who require defendant's interline service to reach a market in those territories, those shippers are being subjected to undue prejudice so long as the defendant continues to offer its single-line service to any competing shippers of furniture who are

fortunate enough to be able to use the latter service. The instant report at page 9 (lines 21-26) has found that such situations exist. In such situations, it appears clear that the result of the assailed rule is to force one of two competing shippers out of a market and thereby cause advantage to its single-line competitor by eliminating some of the latter's competition. The other situation may arise where a shipper in central and southern territory requires defendant's interline service to reach a market in those territories and a competing furniture shipper in another territory who also requires the defendant's interline service to the same market will continue to have such service available. In this latter situation, the result is to offer in one territory a service not offered in another for shipments of furniture moving to the same destination. This, of course, would have the effect of prejudicing shippers between southern and central territories whenever they compete at points with shippers from other territories who need the defendant's interline service and have it available. Conversely, any shippers not in southern and central territories would be advantaged where they require the defendant's interline service to points in that territory and it is available to them. In both of the examples given above, it appears clear that the assailed rule results in a failure to provide equal treatment to competitive traffic and is for that reason unlawful under section 216(d) of the act.

Related to the above is the fact that section 216(b) of the act requires motor common carriers to provide, as here pertinent, adequate service for the transportation of property in interstate commerce and to establish just and reasonable regulations relating thereto. The assailed rule appears to result in the defendant's depriving some shippers of furniture of service adequate for their needs since, as noted, they will apparently be forced out of certain markets in the absence of interline service by the defendant.

If the defendant can establish that there is any justifiable basis for its not handling this interline traffic at the present level of compensation, it may choose to increase that compensation in some acceptable manner. For example, it might be appropriate to publish arbitraries to apply on furniture shipments which move at joint rates and through routes when the lading must be transloaded. Such publication, of course, would be subject to the investigation and suspension provisions of the act.

COMMISSIONER WALRATH, dissenting:

I would affirm the decision and order of Review Board No. 4. Salutary and praiseworthy though the attempt of the majority to justify the result reached may be, I question the validity of the legal premises underlying the justification. Despite reliance upon the national transportation policy and sections of the Interstate Commerce Act too numerous to list, the majority's main thrust is that nothing in the legislative history of section 216(c) confers freedom upon a motor common carrier to establish a scheme of through routes and joint rates which is selective as to a particular class of traffic.

In my view, the report finds a force in the language of section 216(c) which does not inhere in the permissive character of that section. A carrier may only be required to perform service within the scope of its certificate and its election to join with other carriers in providing through service at joint rates does not operate to extend this Commission's authority so as to dictate to the carrier and require the rendition of service beyond the scope of its certificate.

The report holds, in effect and as a matter of law, that if a motor carrier maintains through routes on some traffic, it must maintain through routes on all traffic. This is certainly not the rule under part I which specifically confers authority upon the Commission to require

through routes. Compare *Thompson* v. *United States*, 343 U.S. 549 (grain) and *Denver & R.G.W.R. Co.* v. *Union P.R. Co.*, 351 U.S. 321 (fruits, perishables and livestock). Thus, I consider it inconsistent and unlawful to prescribe a more strict rule under part II where no power resides in the Commission to require motor carriers to join in through routes and joint rates.

Corrective legislation is urgently needed, which the Commission has recommended to the preceding Congress. Without such specific authority, I cannot read into existing law the power to act in the situation here presented.

It is ordered, That the defendant named in the complaint, be, and it is hereby, notified and required to cancel the tariff rule found herein to be unlawful, on or before February 5, 1969, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 217 of the Interstate Commerce Act.

It is further ordered, That the said defendant be, and it is hereby, notified and required to cease and desist, on or before February 5, 1969, and thereafter to abstain from publishing or maintaining the tariff rule found herein to be unlawful.

And it is further ordered, That this order shall remain in force until further order of the Commission.

By the Commission.

H. NEIL GARSON,
Secretary.

(SEAL)

APPENDIX

Restrictive Provisions on Furniture in Motor Common Carrier Tariffs

The restrictive provisions of Associated Truck Lines, Inc., first became effective May 1, 1966. They were established on that date in item 545-J of supplement 88 to Central & Southern Motor Freight Tariff Association (C&S-MFTA) class tariff 100-D, MF-I.C.C. No. 287. Effective May 15, 1968, tariff 100-D, MF-I.C.C. No. 287, was reissued as tariff 100-E, MF-I.C.C. 357, and in the latter issue the provisions under investigation are carried in item 565, which reads as follows:

ASSOCIATED TRUCK LINES, INC.

(a) * * *

(b) On Shipments of Furniture as described in Items 79000 through 83650 of NMFC, Associated Truck maintains no through routes, joint rates or interchange arrangements.

(c) * * *

There are nine other items in the current issue of the C&SMFTA tariff which publish, for nine other carriers, restrictive provisions identical to or substantially the same as those published in item 565 for account of Associated Truck Lines, Inc. [Those items are numbered 530, 610, 675, 770, 845, 880, 925, 1050 and 1570.]

Another restriction for a different carrier, item 670, reads in part:

* * * maintains no through routes, joint rates or interchange arrangements with any other carrier on shipments of Furniture, set up, as described in Items 79000 thru 83650 of NMFC.

There are 18 other items in the above-mentioned tariff which publish, for 18 other carriers, restrictive provisions

identical to or substantially the same as those published in item 670. [Those items are numbered 685, 795, 875, 890, 950-A, 955-B, 1115, 1150, 1315, 1330, 1420-A, 1425, 1455, 1475, 1485-A, 1515, 1555-A and 1575.]

Still, another restriction, item 835-A, reads in part:

* * * maintains no through routes, joint rates or interchange arrangements on shipments of Furniture or Furniture Parts, as described in Items 79000 thru 83650 of NMFC (See NOTE B). NOTE B—* * *

Not applicable on Metal Furniture.

Other restrictions are as follows:

The restriction in item 625 reads in part:

* * * maintains no through routes, joint rates or interchange arrangements on shipments of Furniture and or Furniture Stock, as described in Items 79000 through 83650 of NMFC, except when * * * is the originating carrier.

Item 1060 publishes substantially the same restrictive provisions for account of another carrier.

It has, in fact, become common practice in all territories for motor carriers to limit their handling of set up furniture to local (single-line) hauls.

Following are examples of restrictive provisions published in tariffs filed by Central States Motor Freight Bureau, Inc. (CSMFB), Middlewest Motor Freight Bureau (MMFB) and Eastern Central Motor Carriers Association, Inc. (ECMCA) for the accounts of carriers other than Associated Truck Lines, Inc.

CSMFB tariff 22-C, MF-I.C.C. No. 739, names class rates between points in central territory. Item 1582-E of supplement 251 thereto reads in part:

* * * maintains no through routes, joint rates or interchange arrangements when on shipments of Furniture,

S.U., as described in the National Motor Freight Classification.

MMFB tariff 2-C, MF-I.C.C. No. 517, names class rates between points in Middlewest territory. Item 366-J of supplement 51 thereto reads in part:

* * * maintains no through routes, joint rates or interchange arrangements on shipments of Furniture or Furniture Parts as described in Items 79000 through 83642 of NMFC.

ECMCA tariff 32-E, MF-I.C.C. No. A-276, names class rates between points in eastern territory and points in southwestern territory. Item 3760-D of supplement 100 thereto publishes restrictive provisions * * *, and reads in part:

Subject carrier maintains no through routes, joint rates or interchange arrangements on shipments of Furniture, S.U., as described in Items 79000 through 82700 of the NMFC.

APPENDIX C

ORDER

SERVICE DATE
JANUARY 25, 1968

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, Acting as an Appellate Division, held at its office in Washington, D.C., on the 17th day of January, 1968.

No. 34815

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.

v.

ASSOCIATED TRUCK LINES, INC.

Upon consideration of the record in the above-entitled proceeding, including a petition filed November 17, 1967, by complainant, National Furniture Traffic Conference, Inc., for reconsideration of the decision and order of the Commission, Review Board No. 4, decided October 10, 1967, and a reply thereto filed December 7, 1967, by the defendant, Associated Truck Lines, Inc.;

It is Ordered, That the petition be, and it is hereby, denied for the reason that sufficient grounds have not been presented to warrant granting the action sought.

By the Commission, Division 2, acting as an Appellate Division.

H. Neil Garson
H. NEIL GARSON
Secretary

(SEAL)

APPENDIX D

DECISION AND ORDER

SERVICE DATE
OCTOBER 17, 1967

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 4, held at its office in Washington, D. C., on the 10th day of October, 1967.

No. 34815

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.

v.

ASSOCIATED TRUCK LINES, INC.

Upon consideration of the record in the above-entitled proceeding, including the recommended report and order of the hearing examiner, the exceptions filed by the complainant, and defendant's reply thereto; and

It appearing, That the exceptions, except as reflected in the modification below, do not show any material errors in the examiner's statement and evaluation of the facts, conclusions of law or findings, nor do they raise any material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report by Review Board Number 4 discussing the evidence submitted and arguments advanced by the parties in the light of such pleadings;

Wherefore, and good cause appearing therefor;

We find, That the evidence considered in the light of the exceptions does not warrant a result different from

that reached by the examiner and that the statement of facts, conclusions, and findings of the examiner, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own, with the modification set forth in the next succeeding paragraph.

It is ordered, That the following addition be, and it is hereby made to the hearing examiner's report:

Insert the following as an addition to the paragraph ending at the top of Sheet 5:

> Since the statutory provision regarding through routes and joint rates is permissive only, and not mandatory, the cancellation of such routes and rates would only be an unreasonable practice under section 216(b) if it were shown to be so by appropriate evidence. As stated, the defendant's reason for such cancellation on furniture was that its division of joint-line revenue did not cover its cost, considering the high incidence of damage on the particular traffic. The complainant's evidence here does not show the facts to be otherwise.

It is further ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, Review Board Number 4, Members Brown, Rock, and Downs.

/s/ H. Neil Garson
H. NEIL GARSON
Secretary

(SEAL)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

Served July 27, 1967

No. 34815

NATIONAL FURNITURE TRAFFIC CONFERENCE, INC.

v.

ASSOCIATED TRUCK LINES, INC.

Decided

Tariff rule providing that defendant maintains no through routes, joint rates, or interchange agreements on shipments of furniture found not shown to be unlawful. Complaint dismissed.

John F. Bohman for complainant.

Elmer J. Maue for defendant.

REPORT AND ORDER RECOMMENDED BY OREN G. BARBER, HEARING EXAMINER

The evidence herein, by order of the Commission, was submitted upon modified procedure. Thereafter, the proceeding was assigned to the hearing examiner for the recommendation of an appropriate order thereon, accompanied by the reasons therefor.

The complainant is a voluntary association of manufacturers, wholesalers, and retailers of furniture. By

complaint filed February 5, 1967, the complainant alleges that Associated Truck Lines, Inc., the defendant, through its publishing agent, the Central and Southern Motor Freight Tariff Association, Inc., Agent, (Central & Southern), has published the following tariff provision [1] applicable on movements between the central states territory and the South which violates sections 212(a), 216(b), 216(c), and 216(d) of the Interstate Commerce Act:

> Associated Truck Lines, Inc., maintains no through routes, joint rates or interchange agreements on shipments of furniture as described in Items 79000 through 83650 of MFC.

The complainant asks the Commission to order cancellation of this tariff restriction so as to restore through routes and joint rates to movements of furniture. A tariff item like that above, published for the account of Associated Transport, Inc., but limited to shipments of furniture, set up, was permitted to become effective June 13, 1966. See *Furniture Restrictions by Associated Transport, Inc.*, (not printed) decided February 24, 1966. Complainant's request for suspension and investigation of the item at issue was denied.

The defendant moves to strike the complainant's reply statement as violative of rule 1.49 of the Commission's General Rules of Practice because it restates argument previously presented in the complainant's opening statement and does not rebut the defendant's evidence. This rule is designed to prohibit the introduction of new evidence in the reply which is not in rebuttal of the defendant's statement. It does not proscribe the rewording or restatement of argument in the reply. See *Petroleum*

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[1] This tariff provision, which became effective on July 2, 1966, is contained in paragraph (b) of item 545-K in Central & Southern class tariff supplement 95 to tariff 100-D, MF-ICC 287. According to the record, this is a reissue of an item which became effective on May 1, 1966.

Resin—Hayes Freight Lines, Inc., 66 M.C.C. 489, 490. The motion to strike is denied.

The contested tariff restriction effectively closes all through routes, cancels all joint rates on movements of furniture, and renders unavailable the local rates of the defendant on that commodity as factors of through combination rates over routes with other carriers. Compare *East South Joint Rates and Routes, Cancellation*, 44 M.C.C. 747, 752. The complainant contends that this tariff provision is not a bona fide cancellation of through routes and joint rates, but that it is a disguised attempt to embargo the movement of furniture over through routes and at joint rates which continue to remain available for other general commodities transported by the defendant. It, therefore, urges that this restriction is a violation of the defendant's common carrier obligation to provide service on all commodities it is authorized to carry and constitutes a modification of the defendant's certificate of public convenience and necessity without compliance with the procedures set forth in section 212 (a). The complainant reasons that once the defendant establishes through routes and joint rates, they must be made equally available to all traffic. For these same reasons, the complainant argues that this tariff provision constitutes an inherently unreasonable practice in violation of sections 216(b) and 216(c). Section 216(b) requires motor carriers to establish just and reasonable practices relating to rates and charges maintained. Section 216(c) provides that motor carriers of property may establish reasonable through routes and joint rates with other such carriers.

The complainant further argues that even if the defendant's tariff does constitute a proper cancellation of through routes and joint rates, it violates section 216(d) because it subjects furniture to unjust discrimination and undue prejudice or disadvantage. It alleges that many shippers and retailers of furniture have relied on the

defendant's interline services for many years and that the tariff restriction has seriously handicapped them in the marketing of that article. Furniture in less-than-truckload shipments has ratings ranging from class 55 to class 400. The complainant claims that other commodities, such as games and toys, not subject to this restriction have similar transportation characteristics and similar ratings.

The defendant published the assailed tariff restriction because the division of revenue it received on joint line shipments of furniture purportedly did not cover its cost for such movements, mainly due to the high incidence of damage claims on furniture. However, it still transports single line shipments of furniture and will continue to do so.

The examiner can see no merit in the complainant's contention that the involved tariff provision violates the defendant's common carrier obligation. The defendant still holds itself out to transport furniture at its local rates from and to points it is authorized to serve. It has in no way modified its certificate. The complainant erroneously equates through routes voluntarily established by the defendant with the routes specified in its certificate. The defendant's duty as a common carrier of general commodities is to carry all commodities over the routes and from and to the points enumerated in its certificate. It is not required under the terms of its certificate, or under the provisions of the act, to interchange with other carriers or to participate in through rates, and therefore, its refusal to do so does not violate its common carrier obligation.

The complainant's contention that the tariff restriction violates sections 216(b) and 216(c) are likewise untenable. It has cited no authority in support of its proposition that cancellation of through routes and joint rates on one, but not all, commodities is an unreasonable practice within the purview of section 216(b). Section 216

(c) merely provides that the through routes and joint rates which a motor carrier may establish must be reasonable. The issue raised here by complainant is not the reasonableness of through routes or joint rates now maintained by the defendant, but the reasonableness of the cancellation of them on only furniture. However, this section contains no language purporting to establish any standards governing the cancellation of such routes or rates.

There is insufficient evidence to establish that the assailed tariff provision unjustly discriminates against furniture, unduly prejudices it, or unduly operates to its disadvantage. The complainant's evidence in this record is confined to showing that furniture is the only commodity which the defendant has refused to move over through routes and under joint rates, and to unsubstantiated general statements that shippers of furniture have thereby been injured and that other commodities still moving under such routes and rates have similar ratings and transportation characteristics. It does not identify the commodity or commodities which are allegedly favored by the defendant's action, but only makes vague reference to games or toys which are claimed, but not shown, to have similar ratings. The allegation of unjust discrimination cannot be sustained in the absence of convincing evidence of a difference in treatment by the defendant of a like commodity or a like kind of traffic moving under substantially similar circumstances and conditions. See *Federal Enameling & Stamping Company* v. *Associated Transport, Inc.*, 314 I.C.C. 501, 502. It must also be shown that the alleged discrimination is a source of advantage to the preferred traffic and a detriment to the other traffic. See *Factory Tile, Inc.* v. *South Bend Freight Line, Inc.*, 304 I.C.C. 214, 216. As indicated, there is no definite showing of any specific damage or injury to shippers of furniture or of advantage to other traffic by reason of the tariff restriction complained of.

The evidence likewise does not establish that this tariff provision has created undue prejudice or disadvantage to furniture. To establish undue prejudice or disadvantage, it must not only be shown that furniture traffic has been accorded a different treatment than a like kind of traffic and that it has thereby been injured, but it must also be shown that it competes with the favored traffic. See *Institute of Scrap Iron & Steel, Inc.* v. *Akron, C. & Y. R.*, 316 I.C.C. 55, 67; *Federal Enameling & Stamping Company*, v. *Associated Transport, Inc., supra; Factory Tile, Inc.* v. *South Bend Freight Line, Inc., supra;* and *Arrangements—Avoca Carrier Corp. and Duplan Silk Corp.*, 4 M.C.C. 657, 677. The complainant does not even allege that furniture is in competition with any of the commodities not subject to the assailed tariff. There can, therefore, be no finding of undue prejudice or disadvantage. Accordingly, the examiner concludes that the assailed tariff provision has not been shown to violate section 216(d) in any respect.

As previously indicated, section 216(c) provides that motor carriers of property may establish through routes and joint rates. That section is permissive only and not mandatory. Therefore, this Commission has no authority to require motor carriers to establish or to continue to maintain through routes or joint rates unless it is shown that the cancellation of some of them and not others would create unjust discrimination, undue preference or prejudice, undue advantage or disadvantage, or otherwise be unlawful under provisions of the act. See *Strickroot* v. *Detroit & C. Nav. Co.*, 253 I.C.C. 535, 537; *East South Joint Rates and Routes, Cancellation, supra*, at pages 753-754.

The examiner finds that the defendant's assailed tariff restriction has not been shown to be unlawful.

Premises considered, it is the order of the Hearing Examiner that in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the

effective date of this order shall be 30 days from the date of service thereof; and that the complaint be, and it is hereby, dismissed.

Dated at Washington, D. C. on this 18th day of July, 1967.

By the Commission, Oren G. Barber, Hearing Examiner.

H. NEIL GARSON
Secretary

(SEAL)

APPENDIX F

STATUTES INVOLVED

RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

SEC. 216 [*August 9, 1935, as amended June 29, 1938, September 18, 1940, and August 24, 1962.*] [*49 U. S. C. § 316.*]

* * * * *

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

(c) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. As used in this subsection, the term "common carriers by water" includes

water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended (including persons who hold themselves out to transport goods by water but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so established and all classifications, regulations, and practices in connection therewith shall be subject to the provisions of this chapter.

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SUPREME COURT, U. S.

JAN 21 1970

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969 No. 997

ASSOCIATED TRUCK LINES, INC., ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION TO AFFIRM

EDWARD A. McCABE
888 Seventeenth Street, N. W.
Washington, D. C. 20006

JOHN F. BOHMAN
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Gardner, Massachusetts 01440

In the Supreme Court of the United States

OCTOBER TERM, 1969

ASSOCIATED TRUCK LINES, INC., ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16 (1) (c) of the Rules of this Court, the National Furniture Traffic Conference, Inc., moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J. S. App. A) dismissing the appellants suit to set aside and annul a report and order of the Interstate Commerce Commission (J. S. App. B, 332 ICC 802) which required Associated Truck Lines, Inc. (Associated) to cancel a tariff rule which reads as follows:

> Associated Truck Lines, Inc., maintains no through routes, joint rates or interchange arrangements on shipments of furniture as described in items 79000 through 83650 in NMFC.

This tariff provision became effective on July 2, 1966, and was contained in paragraph (b) of item 545-k in

Central & Southern Class Tariff supplement 95 to tariff 100-D, MF-ICC 287. This is a reissue of an item which first became effective on May 1, 1966. There has since been another reissuance as more fully explained in the appendix of the report and order of the Interstate Commerce Commission (332 ICC at 818, J. S. 27a).

Prior to the publication of the above-described tariff rule, Associated had agreements with other carriers for through routes and joint rates for the transportation of general commodities, including furniture, between the Central States area and the Southern area (J. S. App. A, 1a).

In 1965, Associated published tariff restrictions and a cancellation of the line rate schedule on shipments of furniture. (J. S. App. A, 2a.) Shippers would then have been charged the higher combination of local rates on through routes. The Interstate Commerce Commission, after due consideration, found that the higher combination rates were not just or reasonable.[2] Thereafter, Associated published the above-described tariff rule cancelling all through routes and joint tariff arrangements on shipments of furniture between the Central States territory and Southern territory.

Following publication of the above-described tariff rule, the National Furniture Traffic Conference, Inc. (N.F.T.C.) filed a formal complaint with the Commission challenging the lawfulness of Associated's tariff restriction on furniture. The matter was assigned for handling under modified procedure on written statements of fact and argument. The Hearing Examiner found that the tariff restriction was not unlawful and recommended that the

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[2] Docket No. M-19650, Furniture Restrictions Between Central & Southern States (not printed) decided September 20, 1965.

complaint be dismissed. This recommendation was approved by Review Board No. 4 and by Division 2 of the Commission acting as an appellate division. N.F.T.C. then filed a petition for reconsideration which was denied. A second petition, based on the ground that the issue involved was one of general transportation importance, was granted. The full Commission then reversed the Examiner and the Review Board. The Commission found that the restrictive tariff provision was unlawful and ordered the restoration of through route, joint rate and interchange arrangements for shipments of furniture.[3]

The Commission found that Associated's selective cancellation of through routes, joint rates and interchange arrangements on furniture clearly placed furniture shippers in a disadvantaged position relative to other general commodities, and found such disadvantage to be undue and unreasonable, and hence unlawful under Section 216 (b), (c) and (d) of the Interstate Commerce Act, 49 U.S.C. § 316 (b), (c) and (d) (332 I.C.C. 812–814 J. S. 19a–23a).

The Commission found that this selective cancellation of the through routes and joint rates would not only require a furniture shipper "to pay a combination of two local rates (rather than a lower single-factor rate), but would also . . . put (the shipper) to the expense (and subjected to the attendant delay) of arranging to have a warehouseman or other person at the point of interchange act as his agent in accepting the shipment from Associated and forwarding it on a new bill of lading." (332 I.C.C. at 808, 809, J. S. 14a–16a.)

Furthermore, the Commission found that routing shipments and processing damage claims would be further complicated. (332 I.C.C. at 812, J. S. 19a–20a.)

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[3] Docket No. 34815, National Furniture Traffic Conferencers. Associated Truck Lines, Inc., December 31, 1968.

The Commission found that the total effect of the restrictive tariff provision will be to restrict the movement of furniture to those territories where single-line service is available. (332 I.C.C. at 812, J. S. 19a.) The Commission concluded that the segmented and regionalized transportation system which will develop from this restrictive tariff rule thus permits Associated selectively to encourage only that traffic which Associated believes more desirable and lucrative. (332 I.C.C. at 812, J. S. 20a.)

The Commission then found that such a selective tariff will prejudice furniture shippers relative to other general commodity shippers and was contrary to Associated's duty to observe reasonable practices and its duty not to put any shipper at an undue and unreasonable disadvantage. (332 I.C.C. at 812–814, J. S. 20a–22a.)

In a concurring opinion, Commissioner Tuggle found that Associated's action was unduly discriminatory because it gave an unreasonable economic advantage to furniture shippers who required only Associated's single-line service to reach a market. Those shippers still received this service, while those shippers who had used Associated's interline service to market their goods were faced with higher costs and added shipping complications. The result of this practice would be to force the latter shippers out of the market, thus benefiting their single-line competitors. Furthermore, this tariff rule would prejudice shippers between Southern and Central territories, who no longer have Associated's interline service available, "whenever they compete at points with shippers from other territories who need (Associated's) interline service and have it available." (332 I.C.C. at 815, 816, J. S. 23a–25a.) Thus, this tariff rule's failure to provide equal treatment to competing traffic required the finding that this tariff was unlawful.

The district court unanimously sustained the Commission's decision, declaring that ". . . we find substantial evidence, considering the record as a whole, to support this finding of the Commission." (J. S. 5a.)

ARGUMENT

This appeal presents no substantial question warranting plenary review, and the judgment below should be affirmed.

1. The argument that the court below failed to consider and decide the question of whether the Commission's action herein exceeds its statutory authority is without merit. The court below found that the Commission acted pursuant to the provisions of Sections 216 (b), (c) and (d) of the Interstate Commerce Act, 49 USCA § 316 (b), (c) and (d) (J. S. 3a). The court below further found substantial case authority in support of Commission activity to prevent or correct unreasonable practices and undue preferences, prejudices and disadvantages created by regulated common carriers. *American Trucking Association V. A. T. & S. F. R. Co.* 387 U. S. 399 (1967), 18 L. Ed. 2d 847, 863 (1967); *Greyhound Lines, Inc.* v. *U. S.* 268 F. Supp. 746 (N. D. Ill. E. D. 1967); *Crescent Liquor Co.* v. *Platt*, 148 Fed. 894, 900-902 (N. D. W. Va. 1906).

2. The argument that the Commission has promulgated a new policy radically limiting the right of motor common carriers of property under Section 216 (c) to voluntarily establish through-route, joint-rate and interchange arrangements is without foundation. This case does not involve a Commission order directing the initial establishment of through routes, joint rates and interchange arrangements. On the contrary it involves a Commission order directing Associated to cancel a restrictive tariff

provision found to be in violation of Sections 216 (b) and (d) of the Interstate Commerce Act. The effect of the order of cancellation is to require Associated to re-establish services which had been in effect before the restrictive tariff provision was published. The initial establishment of such services by Associated was a voluntary act on its part. The initial establishment of such services was not ordered by the Commission.

The uncontroverted facts of record indicate that the cancellation by Associated of its long established through-routes, joint-rates and interchange arrangements on furniture caused severe economic hardship on furniture shippers which had long relied on such services. In this context Associated's restrictive tariff provision was ordered cancelled by the Commission as being in violation of Sections 216 (b) and (d). Clearly, therefore, the Commission's order does not involve the initial establishment of such services. Nor is it a new policy for the Commission to seek to prevent and correct unreasonable practices under Section 216 (b) and unjust discriminations and unreasonable preferences and prejudices under Section 216 (d).

The Commission's decision also involves a request to its Suspension Board to suspend on its own motion similar restrictive tariff provisions which may be filed in the future. This is consistent with the specific suspension powers granted to the Commission in Section 216 (g) of the Interstate Commerce Act. If, after suspension, the carriers involved establish that their tariff provisions do not violate provisions of the Interstate Commerce Act, presumably their tariff provisions will be allowed to take effect.

3. The argument that the Commission's decision rests upon the proposition that for a motor common carrier to

hold out through-route, joint-rate and interchange arrangements on some authorized commodities and not on others is *per se* unlawful is a clear misinterpretation of the Commission's decision. The Commission indicates at 332 I.C.C. 814 (J. S. 21a, 22a) that it has made no such broad interpretation of a common carrier's responsibilities under Section 216 (c). In addition, the court below also refused to go this far in its interpretation of a common carrier's responsibilities (J. S. 3a).

4. The argument that the Commission's decision is an abrupt reversal of a long line of decisions which held that Section 216 (c) of the Interstate Commerce Act is permissive and that through-route, joint-rate and interchange arrangements may be voluntarily established or withdrawn, is without merit. As the Commission indicates at 332 I.C.C. 813 (J. S. 21a) ". . . there is nothing in our prior reports which prevents us from ending unreasonable practices of the kind found to exist here." Compare *American Trucking Associations, Inc., et al.* v. *Atchison, T. & S. F. Ry.*, 387 U. S. 399, 416 (1967).

5. The Commission's decision and order, and the decision of the court below, were and are just and proper. The voluntary and permissive provisions of Section 216 (c) cannot be used by common carriers to discriminate unjustly, *American Trucking Associations, Inc.* v. *Atchison, T. & S. F. Ry.* 387 U. S. 399 (1967), nor can they be used to cancel arbitrarily those services on which shippers have come to rely. *Greyhound Lines, Inc.* v. *U. S.* 268 F. Supp. 746 (N. D. Ill. E. D. 1967). The voluntary and permissive provisions of Section 216 (c) of the Interstate Commerce Act do not give motor common carriers of property a license to violate Sections 216 (b) and (d) of the Interstate Commerce Act. The uncontroverted facts

of record indicate that Sections 216 (b) and (d) have been violated by Associated. If motor carriers of property are not prevented from violating Sections 216 (b) and (d) as a result of their exploitation of the voluntary and permissive provisions of Section 216 (c) the objectives of the National Transportation Policy will never be realized. That serious consequences inevitably will be the result have been recognized both by the Commission and the court below. (332 I.C.C. at 812, J. S. 19a, 20a.) See also *Crescent Liquor Co.* v. *Platt*, 148 Fed. 894, 900–902.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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SUPREME COURT, U. S.

FILED

JAN 30 1970

JOHN F. DAVIS, CLERK

No. 997

In the Supreme Court of the United States

OCTOBER TERM, 1969

ASSOCIATED TRUCK LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

MOTION TO AFFIRM

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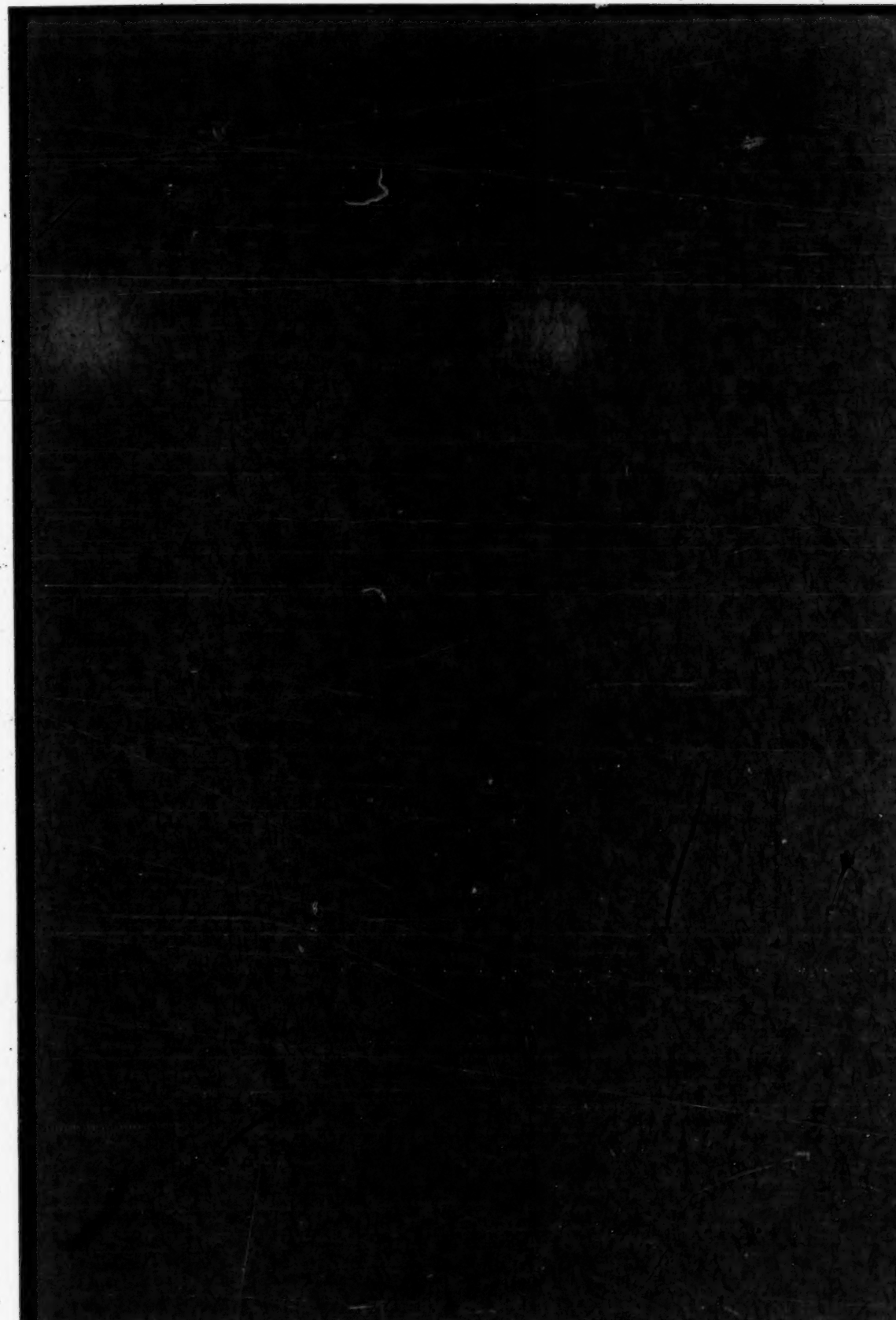

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 997

ASSOCIATED TRUCK LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal by a motor common carrier from the final judgment of a three-judge district court (J.S. 1a–5a) dismissing an action brought to set aside an order of the Interstate Commerce Commission (J.S. 6a–29a). The order required the cancella-

375-281—70

tion of a tariff item discontinuing appellant's participation in through routes, joint rates and interchange arrangements for the truck transportation of furniture. The Commission found such discontinuance inconsistent with Section 216(b) of the Interstate Commerce Act, 49 U.S.C. 316(b).

Appellant is a motor common carrier of general freight, operating principally in Indiana, Michigan and Ohio.[1] Early in 1965, believing its share of the charges on shipments of furniture from the South to be inadequate, appellant sought to publish a tariff item, by which it would have discontinued its participation in joint rates on furniture, while leaving intact the other through routes and interchange arrangements that it had negotiated with connecting truckers serving the South. On protest of the National Furniture Traffic Conference, Inc., among others, the Commission ordered the new tariff item suspended. Following investigation the Commission held that the tariff item had not been shown to be just and reasonable, and was in violation of Section 216(b).[2]

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[1] According to appellant's annual report, appellant's operating revenue reached $41 million in 1968, with an operating ratio of about 94.6.

[2] Appellant, in its supporting statement filed with the Commission, declared its action reasonable and justified "due to the underpricing of transportation rates on light and bulky shipments of furniture and the disparity in such pricing in relation to other commodities of similar densities becoming greatly accentuated on joint line movements since carriers must divide the through revenue" (page 11).

[3] Order of the Commission, Division 2, acting as an Appellate Division, entered November 24, 1965, in Investigation and Suspension Docket No. M-19650, *Furniture Restrictions Between Central and Southern States*, not printed.

Appellant thereupon published the tariff item assailed in this case, effective May 1, 1966. The Conference again complained, and appellant in its responsive statement attempted, as it had in the prior proceeding, to justify its action by asserting that the revenue it received from participating in through joint-line movements of furniture was insufficient.[4]

The Commission observed that the appellant continued to hold itself out to transport furniture, but only upon tender by the shipper itself, rather than by a connecting trucker, and only upon payment of the higher local rates, which the Commission had previously held were not shown to be just and reasonable. The Commission held that such deliberate discouragement of the movement of furniture, while the appellant continued to participate in through routes, joint rates and interchange arrangements on other general commodities the transportation of which the appellant deemed to be more desirable, constituted an unreasonable and discriminatory practice in violation of Sections 216(b) and 216(d) of the Act (J.S. 19a–21a). To the appellant's complaint of inadequate revenue, the Commission replied, "The short answer to this claim is that other remedies are available under other sections of the act" (J.S. 20a). Upon review, the three-judge district court unanimously sustained the Commission (J.S. 5a).

[4] In its statement filed with the Commission appellant said that "the division of revenue accruing to it on joint line shipments of furniture * * * was not only non-compensatory but was seriously eroding the profits from other more compensatory traffic * * * (page 6).

ARGUMENT

The question presented by this appeal is insubstantial, and is similar to that in *Greyhound Lines* v. *United States*, 268 F. Supp. 746 (N.D. Ill.), affirmed *per curiam*, 389 U.S. 216.[5]

Appellant here has invoked the device of seemingly cancelling a through route in an evident attempt to resolve a rate problem which it deemed to be frustrating. That such a withdrawal in another context might be perfectly lawful and within the scope of management's discretion does not negate the fact that in this case its result was unfair discrimination. As a court observed in a similar situation, "* * * the unauthorized imposition of an embargo on a particular service because the continuation of that service would result in a financial loss is an unlawful practice * * *." *New York Central R. Co.* v. *United States*, 201 F. Supp. 958, 960 (S.D. N.Y.), appeal dismissed for mootness, 371 U.S. 805.

[5] Appellant *Greyhound* in its jurisdictional statement (No. 555, O.T., 1967, p. 4) claimed: "The Interstate Commerce Act does not give the Commission power to compel carriers to enter into [joint traffic arrangements], and the Commission in its report does not claim that it has that power and does not base its holding upon the premise that it has that power. It is a well settled common-law rule, recognized by the District Court, that where the Commission does not have power to compel carriers to enter into a joint traffic arrangement it may not forbid withdrawal from such an arrangement that has been voluntarily established. The Commission, of course, lacks the power to change the common law, and it followed this common-law rule for many years in cases involving the construction of § 216(g) and other sections of the Act until the decision here in issue. Accordingly, we say that § 216(g) does not authorize the Commission's order."

The appellant erroneously attributes to the Commission the position that a motor common carrier of general commodities who has undertaken to participate in through-route, joint-rate arrangements with connecting carriers is unable to withdraw therefrom (J.S. 6). Although urged by the Conference to take such a position, both the Commission and the lower court specifically rejected it (J.A. 3a, 21a–22a). As the lower court noted, " * * * we find it unnecessary to decide that issue because the Commission found that Associated's selective cancellation here clearly placed furniture shippers in a disadvantaged position relative to other general commodities, and found such disadvantage to be undue and unreasonable, and hence unlawful under Section 216 (b), (c) and (d). American Trucking Association v. A.T. & S.F. R. Co., 18 L. Ed. 2d 847, 863 (1967); Greyhound Lines, Inc. v. U.S., 268 F. Supp. 746 (N.D. Ill., E.D. 1967); Crescent Liquor Co. v. Platt, 148 Fed. 894, 900–902 (N.D. W. Va. 1906)."[6]

Whether a rate is just and reasonable and non-discriminatory is a question of fact, and it is for the Commission to decide that question upon its consideration and weighing of the evidence. *Board of Trade* v. *United States*, 314 U.S. 534, 546; *Illinois Central & C.R.R.* v. *Interstate Commerce Commission*, 206 U.S. 441, 454, 466; *Cin., N.O. & Tex. Pac. Ry.* v. *Inter-*

[6] The direction to the Board of Suspension to suspend similar tariff filings (J.S. 22a) is not a prejudgment of the issues then to be investigated by the Commission under Section 216(g) of the Act nor a denial of the respondent's right to cancel through-route, joint-rate arrangements on particular traffic, as alleged by appellant (J.S. 11).

state Commerce Commission, 162 U.S. 184, 196. The lower court, upon examination of the record, properly found that substantial evidence supported the Commission's finding that the assailed tariff item was unlawful (J.S. 5a).

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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SUPREME COURT, U. S

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 997

ASSOCIATED TRUCK LINES, INC., ET AL.,
Appellants,

—v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Michigan, Southern Division

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Appellants are aware that the Court does not encourage briefs in reply to motions to affirm. (Rule 16(4).) However, they believe that two matters in the Government motion to affirm herein require clarification for a proper consideration of the issues involved and submit this brief for that purpose.

First, the Government states at page 4 of its motion that the question presented by this appeal "is similar to that" in *Greyhound Lines* v. *United States*, 268 F. Supp. 746 (N.D. Ill. 1967), affirmed *per curiam*, 389 U.S. 216. However, the Court in the *Greyhound* case, at 268 F. Supp. 748, noted the significant difference in the Com-

mission's statutory power with respect to through routes between motor carriers of property such as is involved here and its power over through routes of a motor carrier of passengers as was there involved.

> "Other cases cited by Greyhound involve the establishment of through routes between motor carriers of property or a motor carrier of property and a water carrier. The Commission's authority with respect to such carriers arises under Section 216(c), 49 U.S.C. 316(c), which is permissive and provides 'Common carriers of property by motor vehicle *may* establish * * *.' (Italics supplied.) Section 216(a), with respect to passenger carriers, is mandatory and reads, 'It shall be the duty of every common carrier of passengers by motor vehicle to establish * * *.' No case involving a passenger carrier has been cited by Greyhound."

The permissive nature of Section 216(c) in contrast to the mandatory requirements of Section 216(a) results in a fundamental dissimilarity of the issues in the *Greyhound* case and in this appeal, contrary to the Government's statement.

Secondly, in setting out the issues on this appeal, the Government has failed to make the necessary distinction between the Commission's action in requiring appellant Associated Truck Lines, Inc., to establish through-route, joint-rate, and interchange arrangements on furniture, and its action directing the summary suspension of future tariffs seeking to cancel such arrangements on some

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The Court stated in the *Greyhound* decision that "even in cases involving motor carriers of property, the Commission has, where appropriate, refused to permit withdrawal of a voluntarily established service. But the only authority cited was *Washington, D. C., Store-Door Delivery*, 27 I.C.C. 347, which involved the withdrawal of a delivery service by railroad carriers and which was decided in 1913, rather than 1939 as shown in the *Greyhound* report), more than twenty years before passage of the Motor Carrier Act.

commodities but not on others. At page 5, the Government states:

> "The appellant [*sic*] erroneously attributes to the Commission the position that a motor common carrier of general commodities who has undertaken to participate in through-route, joint-rate arrangements with connecting carriers is unable to withdraw therefrom (J.S. 6)."

The tariff provision of Associated Trunk Lines, Inc., cancelling its through-route, joint-rate arrangements on furniture, which the Commission found unlawful, became effective July 2, 1966, and was a reissue of a provision originally effective May 1, 1966, whereas the complaint which formed the basis of the Commission's action was filed February 5, 1967, more than nine months after the initial effective date of the cancellation. (J.S. 7a) Thus the issue with respect to the Commission's order that Associated cancel the tariff provision in question (J.S. 26a), is not whether the Commission can prevent a property motor carrier's withdrawal of a through-route arrangement, *but whether it may compel such a carrier to establish a through-route arrangement.* This distinction was made clear in appellants' statement of the questions and in the body of the jurisdictional statement. (J.S. 3, 10-11) The assailed order compelling Associated to establish through routes on furniture is in direct conflict with the express terms of Section 216(c) providing that, "Common carriers of property by motor vehicle *may* establish reasonable through routes and joint rates. . . ." (Emphasis added)

This appeal raises for the first time the question of the Commission's power under the permissive provisions of Section 216(c) to compel a property motor carrier to establish through routes on one commodity if it maintains through routes on other commodities. It also raises the question of the Commission's power under that statutory section to declare such an all-or-none policy as a

standard for future tariff publication by motor property carriers. Appellants urge the Court to find that the questions are substantial and require that probable jurisdiction be noted herein.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

ASSOCIATED TRUCK LINES, INC., ET AL. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

No. 997. Decided February 24, 1970

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.